

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 9, 2004 Session

DWAYNE SAMFORD v. JENNIE OGLES, ET AL.

**Appeal from the Chancery Court for Rutherford County
No. 00CV-525A Robert E. Corlew, III, Chancellor**

No. M2003-01299-COA-R3-CV - Filed October 6, 2004

Purchaser of residential property filed this negligent misrepresentation action against the real estate agent and broker alleging they knew of flooding, failed to communicate that information to Plaintiff and thus were liable for negligent misrepresentation. The trial court dismissed Plaintiff's complaint on summary judgment holding that there was no evidence that Defendants misrepresented their knowledge of the property. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

John D. Drake, Murfreesboro, Tennessee, for the appellant, Dwayne Samford.

David W. Kious, Murfreesboro, Tennessee, for the appellee, Jennie Ogles and Snow and Wall Realtors.

OPINION

Plaintiff Dwayne Samford entered into a contract to purchase a home and lot¹ from Dorothy and Grady Sullivan. Prior to entering into the contract, the Sullivans completed a Tennessee Property Condition Disclosure (disclosure form), initially checking "no" to the question inquiring whether the property had "flooding, drainage, or grading problems" and noting no other property defects.² The disclosure form was then presented to Plaintiff. Subsequently, but prior to closing, the disclosure form was revised, the word "drainage" was circled, and the revised form was presented to Plaintiff. Within one month after acquiring the property, Plaintiff began experiencing

¹The home and lot are located at 372 Midland-Fosterville Road, Bell Buckle, Tennessee.

²Section C of the Tennessee Residential Property Condition Disclosure Form asks, "ARE YOU (SELLER) AWARE OF ANY OF THE FOLLOWING?" It then lists a litany of possible property defects, the tenth of which is "Flooding, drainage or grading problems."

extensive flooding. He states that flood waters got into his drinking water, that mud came up through the bathtub drain, that water got into his garage, and that at times there was so much water that his “truck started floating across the yard.” He initially filed suit against the Sullivans and obtained a judgment against the Sullivans for damages and rescission of the contract; however, he was unable to satisfy the judgment against the Sullivans. Plaintiff then brought this action against the real estate agent, Jennie Ogles, the realtor who listed the property, and Snow and Wall Realtors, the broker with which she was affiliated.³

In this action Plaintiff alleges that Ogles knew of flooding problems independent of what was otherwise disclosed by the Sullivans and that she failed to disclose those problems to him; thus, she and her broker are liable to him for negligent misrepresentation. Plaintiff also alleges that Ogles owed her a higher duty because she was not only the listing agent, she was also the “facilitator” acting for both the sellers and Plaintiff. Defendants deny having knowledge of a flooding problem or drainage problems other than those disclosed prior to closing. Defendants admit that Ogles was both the listing agent and a facilitator for the sellers and buyer.

Plaintiff alleges that Ogles has admitted knowing about flooding when she presented the Sullivans’ disclosure form to him and that she failed to disclose to him what she knew. He bases this allegation on Ogles’ testimony in the previous, related action against the Sullivans, *Samford v. Sullivan*.⁴ Defendants deny having any knowledge about flooding prior to the closing and insist that Ogles’ knowledge was limited to drainage problems. Because of that knowledge, she acted on Plaintiff’s behalf by taking the initial disclosure form back to the Sullivans requesting that they correct the form. Once the Sullivans circled “drainage” to disclose that there was a drainage problem,⁵ Ogles delivered the corrected disclosure form to Plaintiff.⁶

³ Plaintiff originally named Jennie Ogles, Snow and Wall, Roger Hughes and Middle Tennessee Mortgage, Inc., as Defendants. It appears the suit against Roger Hughes and Middle Tennessee Mortgage was voluntarily dismissed on July 31, 2000. The record contains a Notice and Order of Non-Suit as to Defendant Middle Tennessee Mortgage, Inc., only. The record is silent as to Defendant Roger Hughes. Since Mr. Hughes was employed by Middle Tennessee Mortgage to inspect the realty, we assume the suit against Hughes was dismissed as well.

⁴ The previous action was *Samford v. Sullivan*, case number 97CV1620, Chancery Court for Rutherford County, Tennessee. Plaintiff prevailed in that action but was unable to satisfy the judgment. Therefore, this action ensued.

⁵ The Tennessee Residential Property Condition Disclosure was signed by the Sullivans on February 17, 1997, and by Plaintiff on February 20, 1997, the same day Plaintiff entered into the contract to purchase this realty.

⁶ Ogles explained, “I let [Plaintiff] know that I had revised that because there was – there was a drainage problem on the property, but it wasn’t marked when Ms. Sullivan signed that.” Ms. Ogles also stated that both versions of the disclosure form, the one without “drainage” circled and the one with “drainage” circled, were communicated to Plaintiff.

Defendants moved for summary judgment asserting that Plaintiff failed to establish that Ogles had actual knowledge of flooding or that she knew any more about flooding than Plaintiff.⁷ The trial court granted the motion. Stating that it had examined the record and the testimony in *Samford v. Sullivan*, the trial court held that “no evidence indicates that Ms. Ogles actions in this matter can be classified as fraudulent or that she misrepresented her knowledge” of the property at any time.⁸ Plaintiff appealed.⁹

The sole issue on appeal is whether the trial court erred in dismissing Plaintiff’s claim for negligent misrepresentation by summary judgment. Plaintiff’s principle allegations are that Ms. Ogles supplied false information to him by not telling him of the property’s propensity for flooding and by not ensuring that the box on the disclosure form was checked, Ogles failed to exercise reasonable care in obtaining or communicating to Plaintiff information upon which Plaintiff relied.

This is an appeal from the trial court’s summary judgment award, thus we review it *de novo*, with no presumption of correctness. *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 534 (Tenn. 2002). Accordingly, we make a fresh determination regarding whether the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50 (Tenn. 1997). Summary judgments are not appropriate when genuine issues of material fact exist. Tenn. R. Civ. P. 56.03; *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. Ct. App. 1993). The moving party has the burden of proof and must either conclusively establish an affirmative defense or negate an essential element of the non-moving party’s claim. *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998) (citing *Byrd*, 847 S.W.2d at 215). If and when this is accomplished, the burden shifts to the non-moving party. *McCarley*, 960 S.W.2d at 588. We “must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence.” *Byrd*, 847 S.W.2d at 210-211. If there is any doubt as to whether or not a genuine issue exists, summary judgment shall be denied. *Byrd*, 847 S.W.2d at 211; *McCarley*, 960 S.W.2d at 588 (Tenn. 1998).

Plaintiff has alleged and Defendants have admitted that Ogles was both the listing agent for the Sullivans and the facilitator for the Sullivans and Plaintiff. As a facilitator, Ogles owed Plaintiff a duty to disclose any defects of which she had actual notice, and she was obligated to act honestly and in good faith. Tenn Code Ann. § 62-13-403; *Wyner v. Athens Utilities Board*, 821 S.W.2d 597, 599 (Tenn. Ct. App. 1991).

The elements in negligent misrepresentation actions against other professionals and business persons are stated in the *Restatement, Second, Torts*, § 552 (1977), which Tennessee has adopted.

⁷Defendants filed a previous motion to dismiss Plaintiff’s claim under the Tennessee Residential Disclosure Act. The trial court granted the motion by partial summary judgment holding the claim was time barred.

⁸The trial judge also held that any fault was attributed to the Sullivans, the sellers.

⁹Plaintiff’s appeal is limited to the summary judgment at issue; he does not appeal the dismissal of the other claim.

Robinson v. Omer, 952 S.W.2d 423, 427 (Tenn. 1997). In order to prevail on his negligent misrepresentation claim, Plaintiff must establish the following four elements:

- (1) the defendant is acting in the course of its business, profession, or employment, or in a transaction in which it had a pecuniary (as opposed to gratuitous) interest; and
- (2) the defendant supplies faulty information meant to guide others in their business transactions; and
- (3) the defendant fails to exercise reasonable care in obtaining or communicating the information; and
- (4) the plaintiff justifiably relies upon the information.

Robinson v. Omer, 952 S.W.2d 423, 427 (Tenn. 1997) (citing *John Martin Co. v. Morse/Diesel, Inc.*, 819 S.W.2d 428 (Tenn. 1991)).

To prevail in their motion for summary judgment, Defendants must either affirmatively establish an affirmative defense or negate an essential element of Plaintiff's negligent misrepresentation claim. *McCarley*, 960 S.W.2d at 588.

There is no evidence in the record to support Plaintiff's contention that Ogles possessed any greater knowledge than Plaintiff concerning flooding or that she misrepresented her knowledge to Plaintiff. To the contrary, Ogles' testimony in *Samford v. Sullivan* reveals that Ogles was shown a picture¹⁰ of the property and asked if she ever saw "anything like this level of water in or about the home" to which she replied, "I've never seen this much water. I was never out there when it was this much." Moreover, there is no evidence in the record to support the allegation that she did not exercise reasonable care in obtaining or communicating information to Plaintiff. To the contrary, the record reveals that Ogles communicated what knowledge she had of the flooding problem to Plaintiff. Most significantly, Ogles explained that she believed there was a drainage problem and that the initial disclosure form was inaccurate when the Sullivans presented it to Plaintiff. Because Ogles believed the initial disclosure form was inaccurate, she returned the disclosure form to the Sullivans and requested that they correct it by circling "drainage." Once the disclosure form was corrected, Ogles presented the revised disclosure form to Plaintiff. This was done prior to closing. Significantly, Plaintiff did not deny receiving the revised disclosure form. When asked if he had received the revised disclosure form with "drainage" circled, Plaintiff stated, "Not that I can recollect. It's been five years ago, but there might have been one that was circled. I don't know for sure on that, sir."

The record also contains uncontroverted evidence that Plaintiff had independent knowledge of water and drainage problems. Plaintiff testified that he met with Ogles and the Sullivans to walk through the property, during which he was advised of the following concerns:

¹⁰The picture is not in the record.

[The Sullivans] walked me through the house and just showed me what room was what, what was going on. Walked me outside at one point in time and told me there was two low spots in the yard where some water stood and some backfilled dirt would cure that problem.

....

Mr. Sullivan did show me . . . the circuit breaker box – and Mrs. Sullivan as well showed me the circuit breaker box and said they were concerned that – she spoke up and said her husband was concerned – that sometimes he gets paranoid because that heating and air-conditioning unit was near a drainage ditch on that side of the house. And he was concerned that water would ever get into it; but she said it never happened not to worry about it.

In addition to hearing the Sullivans state their concerns regarding water problems, Plaintiff drove by a “couple of times” before the closing to look at the property. He explained that he “was driving by just to see how the water did lay in the backyard” and that “it was just puddling up, pooling, laying still in the backyard in a couple of low spots.” The record also contains evidence that Plaintiff, if not aware of flooding, was at least concerned there might be flooding. His awareness and concern of flooding, at least to some degree, is also evident from the fact that he went to the courthouse to determine whether the property was in a flood plain. Plaintiff also hired an inspector to examine the property. His inspector examined the property and did not report any “flooding” problems.

Plaintiff was aware of water and drainage problems prior to purchasing the property and was concerned there might be flooding problems. While it appears that Plaintiff was not aware of an actual flooding problem when he acquired the property, there is no evidence in the record to support Plaintiff’s assertion that Ogles was aware of flooding problems. The evidence in the record establishes that Plaintiff had as much knowledge, if not more, than Ogles of the matters at issue.

Two essential elements in a claim of negligent misrepresentation are that the defendant supplied faulty information meant to guide a plaintiff in a transaction and that the defendant failed to exercise reasonable care in obtaining or communicating information. *See McCarley*, 960 S.W.2d at 588. Considering the evidence in a light most favorable to Plaintiff, we are unable to conclude that Ogles supplied faulty information meant to guide Plaintiff in this transaction or that she failed to exercise reasonable care in obtaining or communicating information. Since Plaintiff failed to establish essential elements of his claim, the trial court properly granted summary judgment.

Costs of appeal are assessed against Plaintiff Dwayne E. Samford.

FRANK G. CLEMENT, JR., JUDGE